

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANA SCOTT KRULEE,
Plaintiff,

v.

RECEIVABLES PERFORMANCE
MANAGEMENT, LLC, et al.,
Defendants.

Case No. 5:14-cv-02860-RMW

**ORDER GRANTING MOTION TO
COMPEL ARBITRATION AND
DISMISSING CASE**

Re: Dkt. No. 51

Receivables Performance Management, LLC (“RPM”) and Jefferson Capital Systems, LLC (“Jefferson Capital”) (collectively “defendants”) filed a motion pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* (“FAA”), to compel arbitration. Dkt. No. 50; Dkt. No. 56-1. Plaintiff opposes on the basis that defendants have not shown that an agreement to arbitrate exists between the parties. Dkt. No. 62. For the reasons explained below, the court GRANTS the motion to compel arbitration and dismisses the case.

I. BACKGROUND

A. Factual Background

Krulee brought this purported class action asserting claims against defendants under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* (“FDCPA”). *See* Dkt. No. 1 (“Compl.”). Krulee’s claims arise out of defendants’ communications attempting to collect

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1 Krulee's delinquent credit card account that originated with First National Bank of Omaha
2 ("FNBO"). *Id.*¹

3 In 2005, Krulee opened a credit card account with Fleet Bank. In July 2005, the Fleet
4 Bank credit card account was transferred to FNBO and became the "Emerge Card." It appears
5 that the account was not in default when it was transferred from Fleet Bank to FNBO. When the
6 credit card account was transferred to FNBO, Krulee was sent a "Welcome Letter" and was
7 provided with the new "Terms and Conditions" that governed the Emerge Card. *See* Dkt. No. 51-
8 1 ("Ryan Decl.") at ¶ 5. The "Welcome Letter" stated:

9 Welcome to Emerge®! Recently, your Fleet Bank (RI), National
10 Bank ("Fleet"), MasterCard® or Visa® account was acquired by
11 First National Bank of Omaha ("FNBO") and effective June 6, 2005
will be replaced with a NEW FNBO Emerge MasterCard or Visa
account, as appropriate.

12 . . .

13 **New account terms will apply.** The terms and conditions governing
14 your new FNBO Emerge account are set forth in the enclosed
Important Notice and the Summary of Terms on the back of this
15 card carrier, both of which are incorporated here by reference. These
new terms and conditions differ from the terms and conditions
16 governing your old Fleet credit card account and will become
effective as to transferred balances and new transactions on July 1,
2005, unless you decline these terms as provided below. Your new
17 FNBO Emerge terms reflect a different governing law provision,
different arbitration provisions, new foreign transaction procedures
18 as the result of recent changes in card association rules, and a new
Foreign Transaction Fee Finance Charge. . . .

19 **Your right to decline new account terms.** The new terms reflected
20 in the enclosed Important Notice and on your Summary of Terms
will become effective as to existing balances and new transactions
21 on July 1, 2005, unless you decline these terms. You must decline
our offer by June 30, 2005 by calling 1-866-646-7027. . . .

22 Dkt. No. 51-1, Ryan Decl. Ex. A, Welcome Letter (bold in original).

23 The Emerge Terms and Conditions included the following arbitration provision:
24

25
26 ¹ The complaint identifies First North American National Bank as the issuer of the Emerge Card,
27 but it appears that FNBO is correct issuer.

1 ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)

2 Any claim, dispute or controversy (whether in contract, tort, or
3 otherwise) at any time arising from or relating to your Account, any
4 transferred balance or this Agreement (collectively, "Claims"), upon
5 the election of you or us, will be resolved by binding arbitration
6 pursuant to this Arbitration Provision and the Code of Procedure
7 ("NAF Rules") of the National Arbitration Forum ("NAF") in effect
8 when the Claim is filed. . . .

9 Dkt. No. 51-1, Ryan Decl. Ex. B, Terms and Conditions.

10 Krulee did not decline the account terms, and used the Emerge Card from about August
11 2005 to November 2010. Eventually, Krulee ran up a debt and defaulted on the Emerge Card.

12 Plaintiff's Emerge Card account was charged off and transferred from FNBO to
13 CompuCredit. CompuCredit is now known as "Atlanticus Services Corporation" ("Atlanticus").
14 The court will refer to both Atlanticus and CompuCredit as "CompuCredit."

15 The "Account Ownership Agreement" transferring plaintiff's account from FNBO to
16 CompuCredit provided that "all right, title and interest" in the charged off accounts were
17 transferred to CompuCredit. *See* Dkt. No. 68-1 ("Maslia Decl.") at ¶ 2.

18 Beginning in March 2006, CompuCredit and Jefferson Capital entered into a series of
19 transactions, and Jefferson Capital eventually purchased plaintiff's debt. Dkt. No. 51-1,
20 ("Weinreis Decl.") at ¶ 4. The first "Account Purchase Agreement" was entered into on March 9,
21 2006, and provided that CompuCredit (and other sellers not relevant here), "for value received,
22 without recourse, assigns, sells and delivers to Jefferson Capital Systems, LLC (the 'Buyer'), all
23 rights, title and interest in and to (i) the Accounts . . ." Dkt. No. 50-5, Weinreis Decl. Ex. A. at
24 ECF pg. 6. Later Amendments to the Account Purchase Agreement, specifically, the Sixth
25 Amendment, caused Krulee's Emerge Card account to be transferred from CompuCredit to
26 Jefferson Capital. *See* Weinreis Decl. ¶ 4.

27 Having acquired plaintiff's charged off credit card account, Jefferson and RPM attempted
28 to collect on it. In an attempt to collect the debt, Jefferson Capital, via RPM, sent an initial
collection notice to Krulee. The notice allegedly falsely states that the "Original Creditor" was

1 “Jefferson Capital.” Plaintiff alleges that defendants’ initial collection notice, which falsely stated
2 that the “Original Creditor” was “Jefferson Capital,” violates 15 U.S.C. §§ 1692e and 1692e(10).

3 **B. Procedural Background**

4 Krulee filed his purported class action complaint on June 20, 2014. Dkt. No. 1. Jefferson
5 Capital and RPM both answered. Dkt. Nos. 14, 16. Plaintiff then filed a motion to strike
6 affirmative defenses from the answers, which the court granted in part and denied in part. Dkt.
7 Nos. 20, 21 (Motions to strike); Dkt. No. 29 (Order). Jefferson Capital and RPM then filed a joint
8 amended answer. Dkt. No. 33. Following a case management conference, the court ordered
9 defendants to “provide to the plaintiff the class size or file a declaration explaining why they are
10 unable to provide the class size,” and otherwise stayed discovery pending a forthcoming motion to
11 compel arbitration. Dkt. No. 49. Defendants then filed the instant motion to compel arbitration.
12 Dkt. No. 51.

13 In connection with the motion to compel arbitration, defendants filed certain documents
14 under seal. Defendants filed the Account Purchase Agreement and its various Amendments
15 between CompuCredit and Jefferson under seal, and did not file the Account Ownership
16 Agreement between FNBO and CompuCredit with the motion to compel. Plaintiff opposed the
17 motion to file the Account Purchase Agreement between CompuCredit and Jefferson under seal,
18 arguing that defendants had not shown good cause for sealing and that plaintiff was prejudiced by
19 not being able to review the document. Dkt. No. 53. Plaintiff also opposed the motion to compel
20 arbitration on the merits, arguing that defendants had not shown that the transfer from FNBO to
21 CompuCredit actually transferred the right to arbitrate.

22 After reviewing plaintiff’s arguments, the court ordered defendants to file the agreement
23 transferring Krulee’s account from FNBO to CompuCredit. Dkt. No. 67 (Order). Defendants did
24 so, and filed the Agreement under seal. Dkt. No. 68. Plaintiff opposed filing the Agreement
25 under seal. Dkt. No. 69. After reviewing both motions to seal, the court denied both without
26 prejudice. Dkt. No. 70. The court ordered the parties to enter into a protective order “allowing

plaintiff (or plaintiff's counsel) access to the unredacted Agreements for purposes of this litigation only." *Id.* The court ordered the parties to enter into a protective order because defendants had previously offered to provide plaintiff's counsel with unredacted copies of the agreements if plaintiff agreed to a protective order, but plaintiff did not respond to this offer. The court then gave each party the opportunity to comment on the contents of the two Agreements. Plaintiff filed a statement indicating that "[a]fter Plaintiff's counsel's review of the documents produced by Defendants, Plaintiff will offer no further briefing, and submits the matter to the Court on the papers filed herein and statements of counsel at the May 22, 2015, hearing." Dkt. No. 78 at 2. The court now evaluates the motion to compel arbitration on the merits.

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Under § 4 of the FAA, a district court must issue an order compelling arbitration if the following two-pronged test is satisfied: (1) a valid agreement to arbitrate exists; and (2) that agreement encompasses the dispute at issue." *United Computer Systems, Inc. v. AT&T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002). "The standard for demonstrating arbitrability is not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the [FAA] is phrased in mandatory terms." *Republic of Nicar. v. Std. Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991). The "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (citations omitted). The FAA's broad sweep reflects both the "liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC*, 131 S. Ct. at 1745 (internal quotation marks and citations omitted).

The FAA creates a body of federal substantive law of arbitrability that requires a healthy regard for the federal policy favoring arbitration and preempts state law to the contrary. *Volt Info.*

1 *Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–79 (1989); *Ticknor v.*
 2 *Choice Hotels Int’l, Inc.*, 265 F.3d 931, 936–37 (9th Cir. 2001). State law is not entirely displaced
 3 from the federal arbitration analysis, however. *See Ticknor*, 265 F.3d at 936–37. When deciding
 4 whether the parties agreed to arbitrate a certain matter, courts generally apply ordinary state law
 5 principles of contract interpretation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944
 6 (1995). Thus, in determining whether parties have agreed to arbitrate a dispute, the court applies
 7 “general state-law principles of contract interpretation, while giving due regard to the federal
 8 policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of
 9 arbitration.” *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009).

10 “[A]s with any other contract, the parties’ intentions control, but those intentions are
 11 generously construed as to issues of arbitrability.” *Mitsubishi Motors Corp. v. Soler Chrysler–*
 12 *Plymouth, Inc.*, 473 U.S. 614, 626 (1985). If a contract contains an arbitration clause, there is a
 13 presumption of arbitrability, *AT&T*, 475 U.S. at 650, and “any doubts concerning the scope of
 14 arbitrable issues should be resolved in favor of arbitration,” *Moses H. Cone Mem’l Hosp. v.*
 15 *Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). The party resisting arbitration bears the burden
 16 of showing the arbitration agreement is invalid or does not encompass the claims at issue. *See*
 17 *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

18 **III. ANALYSIS**

19 Defendants move to compel binding arbitration and to stay the case pending arbitration, or
 20 for the court to dismiss the case. Dkt. No. 56-1. Krulee opposes, arguing that defendants cannot
 21 enforce the arbitration clause in the Emerge Card Terms and Conditions. All of Krulee’s
 22 arguments are directed to the first prong of the two-part test on a motion to compel arbitration, and
 23 Krulee does not contest that the claims at issue here are within the scope of the arbitration clause.
 24 Accordingly, the court finds that the substantive issues which arise from Krulee’s complaint are
 25 within the scope of the arbitration agreement, and the court’s analysis is limited to the questions of
 26 whether an arbitration clause exists and whether defendants may enforce it.

Krulee does not dispute that he opened the account at issue in this case, *see* Dkt. No. 1, at ¶ 10, or that he used the credit card and thereby accepted the terms and conditions of a cardholder agreement. However, Krulee argues that defendants have not shown that they possess the right to arbitrate. Krulee's argument is essentially an evidentiary challenge to defendant's evidence and declarations authenticating the Terms and Conditions and the contracts transferring Krulee's account. Krulee also argues that equity precludes enforcement of the arbitration agreement. The court first addresses the sufficiency of defendant's evidence showing that Jefferson Capital has the right to compel arbitration and then addresses plaintiff's equity argument.

A. The Sufficiency of Defendants' Evidence

Before an item of evidence may be considered, Federal Rule of Evidence 901(a) requires a proper foundation be laid to authenticate the item by "evidence sufficient to support a finding that the item is what the proponent claims it is." *See Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). Such a foundation may be laid by testimony of a witness who has personal knowledge. Fed. R. Evid. 901(b)(1).

1. The Emerge Card Terms and Conditions

Krulee argues that defendants have not shown that the Emerge Card Terms and Conditions apply to Krulee's account. Krulee argues that neither the "Welcome Letter" nor the "Terms and Conditions" are "signed or addressed, or has any indicia of a connection to Plaintiff, or any account of Plaintiff's." Dkt. No. 62 at 4-5.

The court finds that the Ryan Declaration is sufficient to authenticate the Emerge Card Terms and Condition. Mr. Ryan is "an executive correspondence manager for Atlanticus Services Corporation ('Atlanticus') formerly known as CompuCredit Corporation." Ryan Decl. ¶ 1. Mr. Ryan attests, based on his "personal knowledge of Atlanticus' operations, as well as records available to me as they are kept in the ordinary course of its business, and information obtained from other employees upon whom I regularly rely in the ordinary course of business" that FNBO received Krulee's account from Fleet, that the account was serviced by CompuCredit, and that

1 CompuCredit, on behalf of FNBO, mailed the Welcome Letter and Terms and Conditions to all
2 Emerge Card holders, including Krulee. *Id.* ¶¶ 1-6. Mr. Ryan also avers that the documents
3 attached to his declaration are true and correct copies of the Welcome Letter and Terms and
4 Conditions. *Id.*

5 Mr. Ryan is qualified to testify about CompuCredit's business practices and procedures for
6 receiving information from third parties in connection with the sale of assets such as the account at
7 issue. Mr. Ryan is also qualified to attest that the card member agreement is the document that
8 CompuCredit sent to FNBO credit card users. Additionally, plaintiff admits that he had an
9 Emerge Card issued by FNBO and submits no evidence suggesting that the Ryan declaration is
10 suspect. The court therefore concludes that the card member agreement is sufficiently
11 authenticated by the Ryan declaration pursuant to Rule 901, and is admissible.

12 Accordingly, as the Emerge Card Terms and Conditions include the arbitration clause,² the
13 court finds that plaintiff entered into an agreement to arbitrate the claims at issue in this case.

14 **2. The Transfer From FNBO to CompuCredit**

15 Defendants submit the declaration of David Maslia to authenticate the transfer of plaintiff's
16 account from FNBO to CompuCredit. Dkt. No. 68-1. Mr. Maslia is "an Assistant General
17 Counsel of non-party Atlanticus Services Corporation ('Atlanticus'), which was formerly known
18 as CompuCredit Corporation." *Id.* ¶ 1. Mr. Maslia "confirmed that [Krulee's] account was
19 charged off and therefore transferred to CompuCredit pursuant to Section 2.08" of the transfer
20 Agreement. *Id.* ¶ 2. Mr. Maslia also confirms that the "Account Ownership Agreement dated
21 November 17, 2004 between First National Bank of Omaha ('FNBO'), CompuCredit and
22 Transistor, LLC ('Agreement') . . . provides that 'all right, title and interest'" in Krulee's account

23
24 ² "ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS) Any claim,
25 dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating
26 to your Account, any transferred balance or this Agreement (collectively, "Claims"), upon the
27 election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision
28 and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect
when the Claim is filed. . . ." Dkt. No. 51-1, Ryan Decl. Ex. B, Terms and Conditions.

was transferred to CompuCredit. *Id.* Plaintiff offers no evidence to challenge the credibility of the declaration. Mr. Maslia is qualified to attest that agreement between CompuCredit and FNBO covered Krulee’s account and to authenticate the agreement itself. Accordingly, the court concludes that the transfer agreement between CompuCredit and FNBO is sufficiently authenticated by the Maslia declaration pursuant to Rule 901, and is admissible.

The court finds that CompuCredit was transferred the right to arbitrate because the Agreement transfers “all right, title and interest” in the charged off accounts were transferred to CompuCredit. *See* Maslia Decl. at ¶ 2.

3. The Transfer from CompuCredit to Jefferson

Defendants rely on the declaration of Ms. Weinreis, which specifically states that Krulee’s account was subject to the transfers memorialized in the assignments attached to the Weinreis declaration. Ms. Weinreis is a “Senior Bankruptcy Business Analyst and an authorized representative for Jefferson Capital.” Dkt. No. 51-1 ¶ 1. Ms. Weinreis was “responsible for and [has] familiarity with, among other things, maintaining and overseeing debt collection records, account purchase and transfer information, and other account information pertinent to accounts and debts that Jefferson Capital obtains from third parties, including agreements with Atlanticus Services Corporation (‘Atlanticus’), which was formerly known as CompuCredit Corporation.” *Id.* ¶ 3. Ms. Weinreis is qualified to attest that agreements between CompuCredit and Jefferson covered Krulee’s account and to authenticate the agreements themselves. Accordingly, the court concludes that the transfer agreements between CompuCredit and Jefferson Capital are sufficiently authenticated by the Weinreis declaration pursuant to Rule 901, and are admissible.

The transfer agreement confirms that Jefferson was transferred the right to arbitrate, as the agreement confirms that CompuCredit, “for value received, without recourse, assigns, sells and delivers to Jefferson Capital Systems, LLC (the ‘Buyer’), all rights, title and interest in and to (i) the Accounts . . .” Weinreis Decl. Ex. A. at ECF pg. 6.

In sum, the defendants have submitted declarations sufficient to authenticate the Terms and

Conditions and the transfer agreements from FNBO to CompuCredit and from CompuCredit to Jefferson. The Terms and Conditions confirm that plaintiff entered into an arbitration agreement covering the claims at issue. The transfer agreements confirm that defendants have the right to enforce the arbitration agreement. Therefore, defendants have satisfied both prongs of the *United Computer Systems, Inc. v. AT&T Corp.* test, and the court must grant the motion to compel arbitration. 298 F.3d at 766.

B. Equity does not preclude enforcement of the arbitration agreement

Krulee's final argument is that equity prevents the arbitration agreement from being enforced against him. Dkt. No. 62 at 10-11. Krulee points out several perceived disadvantages she will face in arbitration and asserts that arbitration clauses enable parties to circumvent consumer protection laws such as the FDCPA. *Id.* However, these arguments apply with equal force in most circumstances involving an arbitration clause, and the Supreme Court has held that arbitration clauses should be upheld, even in the face of state consumer protection legislation purporting to preclude arbitration in particular types of cases. *See, e.g. AT&T Mobility*, 131 S. Ct. at 1747. Tellingly, Krulee cites no case in support of his equity argument. The court finds no equitable grounds on which reject the arbitration agreement.

IV. ORDER

For the reasons set forth above, the court finds that defendants have shown the existence of an arbitration agreement and that the agreement encompasses the claims asserted by Krulee in this case. Accordingly, the court GRANTS the motion to compel arbitration. The court DISMISSES the case as requested by plaintiff if the court granted the motion to compel.

IT IS SO ORDERED.

Dated: June 11, 2015



Ronald M. Whyte
United States District Judge